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Supreme Court of the United States

OCTOBER TERM, 1960

No. 511

HERMAN HOWZE,
Petitioner

versus

ARROW TRANSPORTATION COMPANY et al.,
Respondents

OPPOSITION TO PETITION FOR CERTIORARI

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The Facts

Petitioner, a longshoreman injured while working in the hold of a grain barge owned by Arrow Transportation Company, who received compensation benefits from his employer's insurer, Zurich Insurance Company, filed this action for damages against Arrow.*

Arrow filed a third-party complaint for indemnity against Zurich, which in turn asserted a claim over

* Contrary to the statement on page 3 of the petition for certiorari, liability of Arrow was not predicated on a "loose and kinked" cable, but on exhaustive averments of improper lighting of the hold of the barge (see complaint, paragraphs 6 and 7, and petitioner's deposition and affidavit).

against petitioner, for reimbursement, out of any recovery which he might realize from Arrow, of compensation benefits paid to him.

On August 5, 1959, the District Court dismissed petitioner's action on Arrow's motion for summary judgment, since petitioner's own testimony showed that no unseaworthiness of the barge or negligence of Arrow, had contributed to his injury.*

Almost five months later, petitioner appealed. The Fifth Circuit dismissed the appeal under Rule 73a, FRCP, which provides a thirty-day period for appeals.

Petitioner contends that since the August-5 order of dismissal did not expressly include the third-party complaint or Zurich's claim for reimbursement, the order was unappealable by virtue of Rule 54b, FRCP.

Petitioner also contends that the decision of the Fifth Circuit in this case conflicts with the decision of the Second Circuit in *Luckenbach vs H. Muehlstein & Co.*, 280 F2d 755.

Question Presented

Whether an appeal, taken more than thirty days after entry of an order terminating an entire case by dismissing the plaintiff's complaint, is timely under Rule 54b, FRCP.

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* As in *O'Leary vs United States Line Co.*, 215 F2d 708 (CA 1-1954), cert. den., 348 US 939, the barge was in the sole custody of petitioner's employer, which was responsible for lighting the hold.

Argument

A

There is no conflict between this case and *Luckenback Steamship Co. vs H. Muehlstein & Co., supra*, as asserted by petitioner.

In the *Luckenbach* case, a third-party complaint was dismissed, leaving the main action still pending. The dismissal of the third-party complaint was held unappealable, absent the determination and direction required by Rule 54b for appealable judgments on less than all of the claims in an action.

Far from raising a conflict between the Fifth and Second Circuits, a prior decision of the Fifth Circuit is to precisely the same effect as the *Luckenbach* case *Employers Liability Assurance Corp. vs. Kahn*, 251 F2d 460 (1958).

But in the case at bar, it was the main action which was dismissed; and since the third-party indemnity complaint and the reimbursement claim were both wholly dependent on recovery by petitioner in the main action, dismissal of the main action necessarily disposed of the claims dependent on it, and terminated the entire litigation.*

* The district court's subsequent entry of an "Order for Final Dismissal", added nothing to its original judgment: "The later filing and entry of a more formal judgment could not constitute a second final judgment in the case, nor extend the time to appeal." *United States vs Schaefer Brewing Co.*, 356 US 227, 233.

B

Petitioner's enigmatic POINT IV is entitled "An order subject to revision is not appealable". However, the argument under this head is not addressed to reviewability of the order, but to the statement in the opinion of the Court of Appeals, that "Howze did not amend his complaint to assert a cause of action against Zurich".

Petitioner apparently seeks so to construe this statement as to intimate that the decision below, in some unexplained way, deprived him of some right of recovery against Zurich, his employer's insurer.

This intimation has no foundation whatever. Petitioner can have no claim against Zurich except possibly for additional compensation benefits. He may, of course, assert such a claim at any time.

For the reasons stated, it is respectfully submitted that this case presents no occasion for exercise of this court's certiorari jurisdiction.

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